

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DARRELL D. FOLEY,

Plaintiff,

v.

SUSAN ILLSTON, SANDRA BROWN
ARMSTRONG, WILLIAM ALSUP, EDWARD
JELLEN, THOMAS CARLSON, RANDALL
NEWSOME, LOIS BRADY, VIVIAN RHOE,
CHARLES NOVACK, ANDREW CHUNG,
KORNFIELD, PAUL & NYBERG,

Defendants.

No. C-05-01797 MMC

**ORDER DENYING APPLICATION TO
PROCEED IN FORMA PAUPERIS;
DISMISSING ACTION**

Before the Court is plaintiff Darrell D. Foley's complaint, filed May 2, 2005 against defendants Susan Illston, Sandra Brown Armstrong, William Alsup, Edward Jellen, Thomas Carlson, Randall Newsome, Lois Brady, Vivian Rhoe, Charles Novack, Andrew Chung, and Kornfield, Paul & Nyberg, by which plaintiff seeks damages in the total amount of \$20 million. Also before the Court is plaintiff's motion to proceed in forma pauperis, filed concurrently therewith. Having read and considered the papers filed by plaintiff, the Court will DENY the application to proceed in forma pauperis, and DISMISS the action, pursuant to 28 U.S.C. §

1 1915(e)(2).

2 3 4 **LEGAL STANDARD**

5 Pursuant to 28 U.S.C. § 1915, “any court of the United States may authorize the
6 commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or
7 appeal therein, without prepayment of fees or security therefor, by a person who submits an
8 affidavit that includes a statement of all assets such person possesses that the person is
9 unable to pay such fees or give security therefor.” See 28 U.S.C. § 1915(a)(1). Where such
10 an affidavit is filed, however, § 1915 requires the court to dismiss the case “at any time” if the
11 Court determines that the allegation of poverty is untrue, the action fails to state a claim, the
12 action is frivolous or malicious, or the action seeks monetary relief from a defendant who is
13 immune from such relief. See 28 U.S.C. § 1915(e)(2).

14 **DISCUSSION**

15 **1. Absolute Judicial Immunity**

16 Judges Illston, Armstrong, Alsup, Jellen, Carlson, and Newsome (“Judicial
17 Defendants”)¹ are all entitled to absolute judicial immunity for their judicial actions. See
18 Ashelman v. Pope, 793 F.2d 1072, 1075 (9th Cir. 1986). “Judges are immune from damage
19 actions for judicial acts taken within the jurisdiction of their courts.” Id. “Judicial immunity
20 applies ‘however erroneous the act may have been, and however injurious in its
21 consequences it may have proved to the plaintiff.’” Id. (citation omitted). A judge lacks
22 immunity only where he or she acts “in the ‘clear absence of all jurisdiction.’” Id. (citation
23 omitted).

24 Plaintiff’s allegations that the Judicial Defendants acted “outside of [their] jurisdiction”
25 are without merit. (See Compl. at 11.) The Supreme Court illustrated the distinction between
26 an act in clear absence of jurisdiction and an act in excess of jurisdiction with the following

27
28 ¹Judges Illston, Armstrong, and Alsup are United States District Court Judges. Judges
Jellen, Carlson, and Newsome are United States Bankruptcy Judges.

1 example:

2 [I]f a probate judge, with jurisdiction over only wills and estates, should try a
3 criminal case, he would be acting in the clear absence of jurisdiction and would
4 not be immune from liability for his action; on the other hand, if a judge of a
criminal court should convict a defendant of a nonexistent crime, he would
merely be acting in excess of his jurisdiction and would be immune.

5 See Stump v. Sparkman, 435 U.S. 349, 357 n. 7 (1978) (citing Bradley v. Fisher, 80 U.S. 335,
6 352 (1871)). In the instant case, plaintiff's allegations against the Judicial Defendants arise
7 from judicial acts such as denying an appeal, dismissing a complaint, and relating cases, all
8 of which were within their jurisdiction as judges. (See Compl. at 11-14.)

9 Accordingly, the Judicial Defendants are entitled to absolute immunity, and the Court
10 will dismiss the claims against said defendants with prejudice.

11 **2. Derived Judicial Immunity**

12 Lois Brady, a bankruptcy trustee, is entitled to derived judicial immunity. See Lonneker
13 Farms, Inc. v. Klobucher, 804 F.2d 1096, 1097 (9th Cir. 1986). "[A] trustee in bankruptcy or an
14 official acting under the authority of the bankruptcy judge, is entitled to derived judicial
15 immunity because he is performing an integral part of the judicial process." Id. "Thus, the
16 trustee also loses his immunity if he acts in the clear absence of all jurisdiction." See Mullis v.
17 United States Bankr. Ct. for the Dist. of Nev., 828 F.2d 1385, 1390 (9th Cir. 1987). In the
18 instant case, plaintiff alleges that Brady violated her fiduciary duty by negligently administering
19 estate assets, conduct clearly within Brady's official duties as a bankruptcy trustee. (See
20 Compl. at 15.)

21 Accordingly, Brady is entitled to derived judicial immunity, and the Court will dismiss
22 the claims against Brady with prejudice.

23 **3. Government Attorney Immunity**

24 Andrew Chung, an attorney for the Department of Justice who represented Judge
25 Jellen in a prior action filed by plaintiff, is entitled to absolute immunity because his actions
26 were taken in connection with the judicial process. See Fry v. Melaragno, 939 F.2d 832, 836
27 (9th Cir. 1991. In Fry the Ninth Circuit agreed with the government's position that government
28 attorneys "fall within the class of government officials whose connection with the judicial

1 process entitles them to absolute immunity.” See id. “Whether the government attorney is
2 representing the plaintiff or the defendant, or is conducting a civil trial, criminal prosecution or
3 an agency hearing, absolute immunity is ‘necessary to assure that . . . advocates . . . can
4 perform their respective functions without harassment or intimidation.” Id. at 837(citation
5 omitted) (ellipses in original). “If the government attorney is performing acts ‘intimately
6 associated with the judicial phase’ of the litigation, that attorney is entitled to absolute
7 immunity from damage liability.” Id. In this case, plaintiff’s allegations against Chung arise
8 from Chung’s representation of Judge Jellen, which is within the judicial phase of litigation.
9 (See Compl. at 17-18.)

10 Accordingly, Chung is entitled to absolute immunity, and the Court will dismiss the
11 claims against Chung with prejudice.

12 **4. Claims Against Attorney Defendants**

13 Plaintiff’s allegations against attorneys Vivian Rhoe and Charles Novack, and their law
14 firm, Kornfield, Paul & Nyberg (collectively, “Attorney Defendants”), all of whom are alleged to
15 have represented plaintiff’s estate in bankruptcy proceedings, do not state a federal claim.
16 Rather, plaintiff’s claims against the Attorney Defendants, for harassment, annoyance, and
17 negligence, arise under state tort law. (See Compl. at 15-18, 99.)

18 Because the Court has dismissed all claims over which it has original jurisdiction, the
19 Court declines to exercise supplemental jurisdiction over the claims against the Attorney
20 Defendants, see 28 U.S.C. 1367(c)(3), and will dismiss such claims without prejudice.

21 **CONCLUSION**

22 For the reasons set forth above:

23 1. Plaintiff’s application to proceed in forma pauperis is hereby DENIED.

24 2. Plaintiff’s claims against defendants Illston, Armstrong, Alsup, Jellen, Carlson,
25 Newsome, Brady, and Chung are hereby DISMISSED with prejudice.

26 3. The Court declines to exercise supplemental jurisdiction over plaintiff’s claims
27 against Rhoe, Novack, and Kornfield, Paul & Nyberg, and hereby DISMISSES such claims
28 without prejudice to plaintiff’s refiling them in state court.

1 The Clerk shall close the file.

2 **IT IS SO ORDERED.**

3
4 Dated: May 25, 2005

/s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge